FILE COPY

No. 829

IN THE

Supreme Court of the United States

JUNE TERM 1948

CLARA SHAPIRO

Petitioner,

v.

ANNETTE SHAPIRO and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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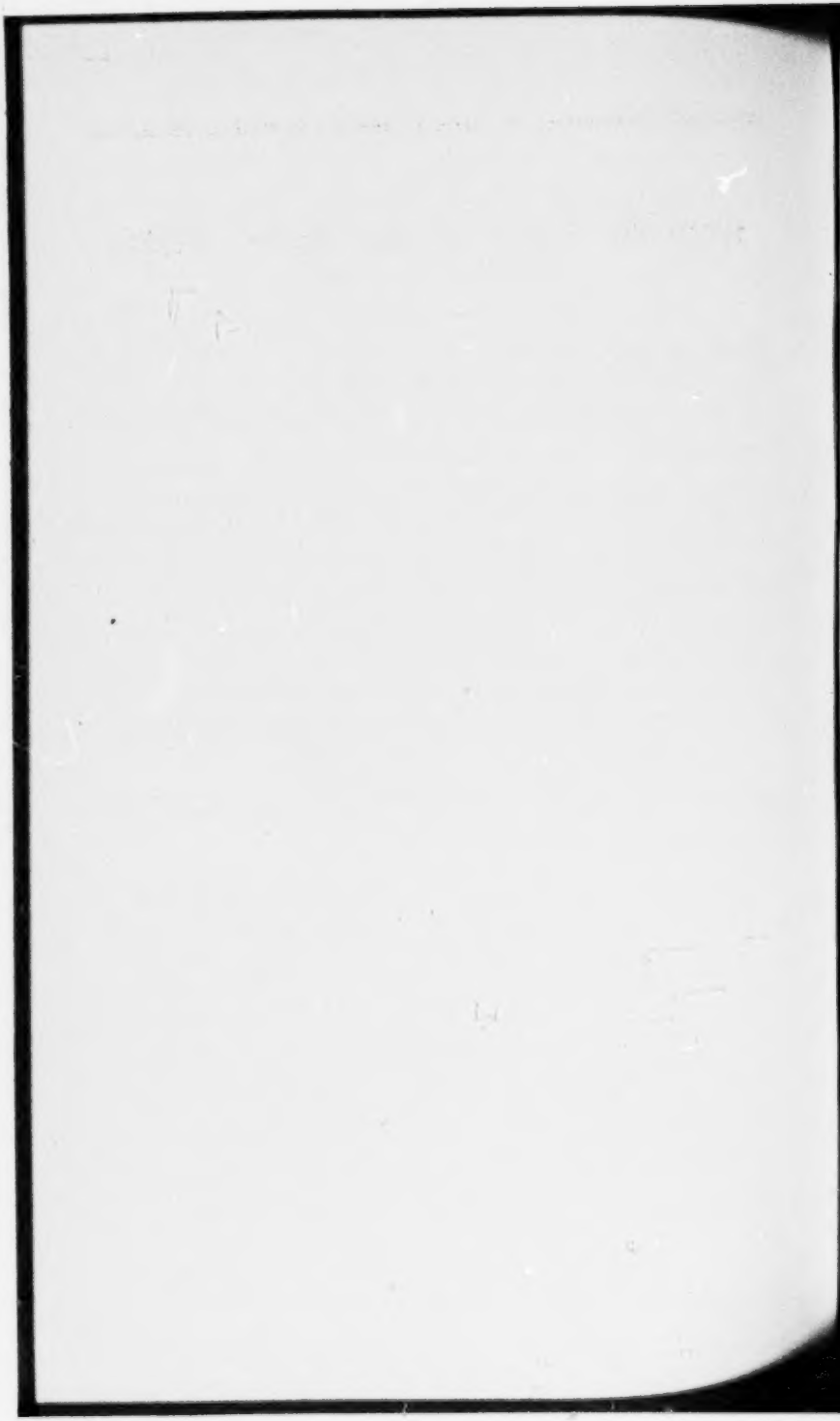

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JUNE TERM 1948

No.

CLARA SHAPIRO

Petitioner,

against

ANNETTE SHAPIRO and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Clara Shapiro, respectfully shows to this Court as follows:

I.

Summary statement of matter involved.

This action involves the benefits of a $10,000 National Service Life Insurance Policy issued to Jerry Shapiro.

On February 22, 1944, Jerry Shapiro died in a conflagration at Camp Pickett, Virginia, while serving as a commissioned officer in the United States Army. He was single when inducted into the armed forces February 26, 1941 and married respondent, Annette Shapiro, October 3, 1942.

Jerry Shapiro applied for and was issued the policy, effective March 1, 1942, naming his mother, petitioner herein, as beneficiary thereof. The policy was in full force and effect at the time of his death.

Claim was made and filed by respondent Annette Shapiro with the Veterans' Administration for payment of the benefits under the policy upon the claim that a change of beneficiary of the policy in her favor was effected by the deceased officer at Fort McClellan, Alabama, between December 18, 1942 and February 22, 1943.

No record of such change of beneficiary was found in the Veterans' Administration and for the purpose of settlement of the insurance, the Veterans' Administration on June 14, 1944 requested the War Department furnish them photostatic copies of all beneficiary designations by the deceased officer, including War Department, Adjutant General's Office Form 41, confidential information and data sheet, etc. Responding to this request, the War Department under date of July 1, 1944 advised the Veterans' Administration that no information was available concerning any designation of beneficiary for insurance, but enclosed a photostat of a W. D., A. G. O. Form 41 of the deceased officer filed in its records.

Form 41 of the War Department, Adjutant General's Office, related to six months gratuity pay under pertinent Army Regulations and not to insurance.

II.

Award of Veterans' Administration.

In disposing of the conflicting claims of the widow and mother, the Veterans' Administration held:

> "There are in the claims folders affidavits of two fellow officers of the insured to the effect that he ad-

vised them that he had changed the beneficiary of his National Service Life Insurance from his mother to his wife, Annette Shapiro, an affidavit from another officer, First Lieutenant John H. Riml, Jr., that during the month of February, 1943, he personally saw the late Second Lieutenant Jerry Shapiro make an application for $10,000 National Service Life Insurance policy in favor of his wife, Annette, while both he and assured were stationed at Fort McClellan, Alabama, and still another affidavit from a Fourth Force, Captain Charles E. Dunn, to the best of his recollection that Second Lieutenant Jerry Shapiro at the time of his transfer from their organiaztion to the Battalion IRTC, changed the beneficiary form designating his wife beneficiary on the basis of the National Service Life Insurance that was already in effect. It is the opinion of this office, however, that these affidavits are insufficient to definitely establish that Form 41 executed by the assured on December 19, 1942, was intended to effect a change of beneficiary of his National Service Life Insurance, and this office accordingly concurs in the recommendation of the Assistant Administrator to the effect that the claim of the widow, Annette Shapiro, be disallowed, and the claim of the mother, Clara Shapiro, be allowed."

Based upon such rejection of her claim, respondent brought this action to have herself declared beneficiary under the policy, alleging:

"That prior to his death the said Jerry Shapiro executed, and that subsequent to his said marriage with plaintiff he executed and duly filed with the proper authorities for that purpose, a written designation of the plaintiff as the beneficiary under the said contract of insurance; and that subsequent to the designating of the plaintiff as such beneficiary no other, or substitute beneficiary thereunder was designated by the said Jerry Shapiro" (R. 6).

III.

The evidence.

Respondent Annette Shapiro was permitted to testify over objection that at Fort McClellan in December, 1942 the assured declared to her that he had changed his insurance policy over to her name (R. 22). She admitted that subsequently while still in Virginia the deceased officer wanted to take out insurance for her (R. 22). Charles E. Dunn, a first lieutenant assigned as adjutant to the 7th Battalion I. R. T. C. in December, 1942, to whom the assured reported for duty, testified that the assured told him he had recently married and wanted to change the beneficiary of his insurance from his mother to his wife. Lieutenant Dunn was very busy and told the assured to come back later (R. 44, 45). A day or two later, he states, the assured returned, and repeated his request. *Lieutenant Dunn did not supply the W. D., A. G. O., Form 41 executed by the assured, Plaintiff's Exhibit 2* (R. 82, 83) *and did not know whether the assured requested a form for designation of beneficiary of six months' gratuity pay from the clerk who gave him the form* (R. 48). The assured executed the designation of beneficiary for gratuity pay and gave the same to the sergeant major for forwarding through the message center to its proper destination (R. 45, 46, 47). Another officer testified that in the early part of 1944 the assured on two occasions stated he had changed the beneficiary of his insurance (R. 57, 58).

Petitioner testified to a conversation had with her son on the occasion of his last furlough at home on Christmas, 1943, at which time he indicated concern for her welfare and assured her of the benefits of his insurance in the event of his death (R. 76, 77, 78). Petitioner's testimony was corroborated (R. 39).

No direction for change of beneficiary was ever filed with the Veterans' Administration, the War Department merely forwarding a *photostat* of the W. D., A. G. O Form 41 to the Veterans' Administration upon its request after death (R. 87).

IV.

Decision of Trial Court.

The trial court held that the execution by the deceased officer of the W. D., A. G. O. Form 41 constituted an effective change of beneficiary of the National Service Life Insurance from the mother to the wife. The opinion of the learned trial court is printed in the Transcript of Record (R. 100-106).

V.

Decision of Circuit Court of Appeals.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment in favor of respondent Annette Shapiro on March 4, 1948. The opinion of the Circuit Court of Appeals (166 F. 2d 24) appears in the Transcript of the Record herein (R. 116-122).

VI.

Jurisdiction of this Court to review the judgment.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 347(a), providing that in any case in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon proper petition, to issue the writ of certiorari.

The petition for writ of certiorari has been filed prior to the expiration of three months from the date of the decision and judgment of the Circuit Court of Appeals, as required by Title 28, U. S. C., Sec. 350 (R. 123).

VII.

The question presented.

The sole question presented is whether a change of beneficiary of a National Service Life Insurance Policy may be effected by filing with the War Department a designation of beneficiary of gratuity pay benefits payable in case of death, and without execution or filing with the Veterans' Administration of any change of beneficiary of the insurance.

VIII.

Reasons relied on for allowance of the writ.

There are many thousands of these National Service Life Insurance Policies now held and which will be continued in force by citizens formerly soldiers in the service of their country. The Veterans' Administration has promulgated regulations, looking toward creation of a rule by which it could readily be ascertained whether in a given case a change of beneficiary has been effected. The regulation of the Veterans' Administration (Oct. 16, 1942, 7 F. R. 8363) relative to beneficiary changes is reasonable. It merely requires that a notice in writing signed by the insured shall be forwarded to the Veterans' Administration, the administrative agency. It guards against uncertainty in the payment of insurance benefits. The holders of these policies as well as the Veterans' Administration are entitled to have a clear cut decision and announcement of the rule to be followed in view of this regulation.

An important question of Federal Law has been incorrectly decided by the Circuit Court of Appeals for the Second Circuit. To allow the decision to stand will not

only work an injustice in the present case, but will cause great confusion in the many similar insurance policies all over the nation and will permit claims of change of beneficiary to be asserted on all sorts of oral testimony, much of which cannot be combatted by the beneficiaries of record.

The decision rendered by the Circuit Court of Appeals is in conflict with the decision of the majority of the Circuit Court of Appeals for the Tenth Circuit in the case of *Bradley* v. *U. S.*, 143 F. (2d) 573, certiorari denied 331 U. S. 793, as well as with other authorities.

The decision of the Circuit Court of Appeals herein on the question herein mentioned has so far departed from the accepted rules of law as to call for the exercise of this Court's power of supervision.

IX.

Record.

Copies of the Transcript of Record in this case in the Circuit Court of Appeals for the Second Circuit are filed herewith in conformity with Rule 38 of this Honorable Court.

X.

Prayer.

Wherefore, petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit requiring said Court to certify and send to this Court a full and complete Transcript of the Record and all proceedings of said Circuit Court had on the cause numbered and entitled on its docket, No. 34-345, Annette Shapiro, plaintiff-appellee v. United States of America, defendant,

and Clara Shapiro, impleaded defendant-appellant, to the end that the said case may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals in said case be reviewed by this Court, and for such other relief as to the Court seems proper.

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May, 1948.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the court below.

This petitioner prays for a review of the decision and judgment entered on March 4, 1948, by the Circuit Court of Appeals, Second Circuit, in the case of Annette Shapiro, plaintiff-appellee, v. United States of America, defendant, and Clara Shapiro, impleaded defendant-appellant, No. 34-345. The opinion of the Circuit Court of Appeals (166 F. 2d 240), appears in the Transcript of the Record herein (R. 116-122).

II.

Jurisdiction.

Jurisdiction is invoked under Title 28, U. S. C. 347 (a).

III.

Statement of the case.

The nature of the case, the facts therein and the ruling of the Circuit Court of Appeals for the Second Circuit have already been set forth in the foregoing petition for the writ of certiorari, which is adopted as a part of this supporting brief.

IV.

Reasons relied on for allowance of writ.

Same are set out in the petition for the writ herein, pages 6-7 and for brevity are not repeated here.

V.

Statutes and regulations.

38 U. S. C. 802 (g):

> "The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, *subject to regulations,* at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries. • • •" (Emphasis ours.)

38 U. S. C. 808:

> "The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this chapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising hereunder."

Regulation of Veterans Administration Oct. 16, 1942, 7 F. R. 8363.

> "The beneficiary shall have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary to cancel the beneficiary designation, or to change the beneficiary. • • • A change of beneficiary to be effective *must be made by notice in writing* signed by the insured *and forwarded to the Veterans' Administration* by the insured or his agent and must contain sufficient information to identify the insured." (Emphasis ours.)

VI.

Argument.

The policy named the assured's mother, the petitioner, as beneficiary thereof and the mother was therefore presumptively entitled to the proceeds and the burden rested upon plaintiff claiming as a substituted beneficiary to show that the insured during his lifetime effected a valid change of beneficiary from his mother to her. *Leahy* v. *United States,* 9 Cir., 15 F. 2d 949; *Cf. Zolintakis* v. *Orfamos,* 10 Cir., 119 F. 2d 571; *Brown* v. *Union Central Life Ins. Co.,* Tex Civ. App. 72 S. W. 2d 661; *In re Burton's Estate,* 116 Pa. Super. 249, 176 A. 819; *Kochanek* v. *Prudential Ins. Co. of America,* 262 Mass. 174, 159 N. E. 520.

Plaintiff failed to show a positive and unequivocal act on the part of the insured designed to effectuate a change of beneficiary of his insurance from his mother to her. Plaintiff's case clearly rested upon the efficacy of the War Department, Adjutant General's Office, Form 41, executed by the insured officer Dec. 19, 1942 at Fort McClellan, to change the beneficiary of his insurance from his mother to herself.

This War Department form was prescribed for and related solely to certain gratuity pay (41 Stat. 367, 10 U. S. C. 903, M. L. 1939, sec. 862, Army Regulation 35-1540).

The War Department and Army Regulations pertinent to gratuity pay benefits covered by the War Department Adjutant General's Office form 41, executed by the deceased, is contained in Pamphlets of the War Department entitled Personal Affairs of Military Personnel and Their Dependents, October 20, 1942, and Personal Affairs of Military Personnel and Aid for Their Dependents,

January 1, 1943 (United States Government Printing Office). Section VI of the latter is entitled "Six Months Death Gratuity" and provides:

> "36. To whom payable—a. Immediately upon official notification of the death * * * of any officer * * * in the active service in the Army of the United States, the Chief of Finance, U. S. Army, will cause to be paid * * * an amount equal to 6 months' pay at the rate received by such officer * * * at the time of his death.
>
> * * * * *
>
> "c. If at the time of death no widow or unmarried child or children under the age of 21 survives, then the gratuity will not be paid unless a dependent relative has been designated as beneficiary. Any married child, or unmarried child over 21, designated as such on W. D., A. G. O. Form 41 (officers) or W. D., A. G. O. Form No. 22 (Enlistment Record) in order to receive payment."

The W. D., A. G. O. Form 41 filled out and duly executed by the deceased officer was designed to and effectively did designate plaintiff as the beneficiary of his gratuity pay. It in no wise related to or pertained to any life insurance. Its very context is inconsistent with the right and privilege of an assured to designate a particular beneficiary in accordance with his wishes. The form indicates a prescribed beneficiary whose name and address must be inserted in line 1, to wit, the wife, and requires an affirmative statement if no wife, or if she is deceased or divorced. A statement of a somewhat similar nature is required to be made relative to children on line 2. It is only after such designations have been made, or it is made to affirmatively appear that such designations could not in fact be made, that any choice of designation is afforded, and even then the form specifically states that the beneficiaries there

designated shall take in the event that the widow and children first designated shall have died or be disqualified before payment is made. Such restrictions are entirely foreign to the right and privilege of an insured to name or designate a beneficiary of his life insurance policy. The deceased was an officer, a graduate of Officers' Candidate School. He was not a menial or subordinate cowed by the presence of austere authority. The form appears to have been filled in by the insured himself aptly in exact accordance with its particular directions, clearly indicative of complete understanding. It was not executed on the battlefield, but clearly appears to be the carefully considered and deliberate act of a responsible officer. It was duly filed in usual course with the appropriate authority. the War Department, Adjutant General's Office. In these circumstances, it cannot be said that the insured not only expressed his intention to change the beneficiary of his insurance policy, but also set in motion the machinery devised by the United States to accomplish the desired result. *Roberts* v. *United States,* C. C. A. 4th Cir., 157 F. 2d 906, 909.

The machinery devised by the United States for the accomplishment of a change of beneficiary of National Service Life Insurance consists in the notice prescribed by the duly designated administrative agency, the Veterans' Administration (38 U. S. C. 808), and its duly promulgated regulation (7 F. R. 8363). As was so well stated by Judge Murrah in *Bradley* v. *United States,* 143 F. 2d 573, 576, cert. den. 331 U. S. 859.

> "The manifest purpose of the foregoing regulation is to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance and to protect the insurer against conflicting claims for the proceeds of the policy (citing authorities)."

In the case at bar, no such notice as is prescribed by the applicable regulation was ever filed with the Veterans' Administration. There is absolutely nothing in the gratuity pay beneficiary form from which it can be legitimately inferred that it was for the use and information of the Veterans' Administration, or that its purpose was to effect a change of beneficiary of the deceased officer's life insurance. The Veterans' Administration was an entire stranger to the document, and did not receive it or have knowledge of its execution until after the death of the insured, and a photostatic copy thereof was forwarded to the Administration upon its request. The alleged notice fails of achieving a change of beneficiary of the deceased officer's life insurance not for want of a ministerial or perfunctory act, which concededly may be supplied, but rather because it may not in law constitute any act designed or calculated to comply with the prescribed regulation. It is well established that intention alone, no matter how clear and persuasive, is insufficient (*Collins* v. *United States,* 161 F. 2d 64, cert. den. 331 U. S. 859, *Ramsy* v. *United States,* 72 F. Supp. 613, *Bradley* v. *United States, supra*).

To effectuate a change of beneficiary of National Service Life Insurance, in addition to an expressed intention, there must be a substantial compliance with the applicable regulations of the Veterans' Administration evidenced by positive and unequivocal acts on the part of the insured designed to effectuate such intentions. *Kaschefsky* v. *Kaschefsky,* 6 Cir. 110 F. 2d 836, *Johnson* v. *White,* 8 Cir. 39 F. 2d 793, *Peart* v. *Chaze,* D. C., 13 F. 2d 908, *Claffy* v. *Forbes,* D. C., 280 F. 233, *Farley* v. *United States,* D. C., 291 F. 238. The converse is equally true (*Kingston* v. *Hines,* D. C., 13 F. 2d 406; *Gifford* v. *United States,* D. C., 289 F. 833; *Chichiarellie* v. *United States,* D. C., 26 F. 2d 484; *Layne* v. *United States,* 7 Cir., 3 F. 2d 431; *Leahy* v. *United States,* 9 Cir., 15 F. 2d 949. This

rule and distinction is clearly set forth by Judge Murrah in the Bradley case. In principle, if not entirely on all the facts, the case at bar is indistinguishable from the Bradley case.

We maintain that precisely because the learned Circuit Court of Appeals for the Second Circuit failed to appreciate this distinction made by the court in the Bradley case, the learned Circuit Court was compelled to the conclusion that the cases on beneficiary change could only be dealt with on the basis of whether the evidence in the particular case showed that the insured had performed an act with intent to change his beneficiary, and that if the Bradley decision be thought to differ the conclusion reached in the dissenting opinion of Judge Phillips in the Bradley case accords with their own view. Obviously, such conflict and confusion in the enunciation and application of a rule of law applicable to National Service Life Insurance must evoke a clear cut announcement by this Honorable Court of the correct rule and law to be followed.

CONCLUSION.

The writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 829.

CLARA SHAPIRO,

Petitioner,

—against—

ANNETTE SHAPIRO and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT ANNETTE SHAPIRO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

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CLARA SHAPIRO,

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ANNETTE SHAPIRO and UNITED STATES OF AMERICA,

Respondents.

BRIEF OF RESPONDENT ANNETTE SHAPIRO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent, Annette Shapiro, respectfully shows unto this Court as follows:

I.

Summary statement of matter involved.

The petitioner in this proceeding seeks to obtain review of the judgment of the United States District Court for the Southern District of New York, affirmed unanimously by the United States Court of Appeals for the Second Circuit, by which it was determined that the respondent, Annette Shapiro, is entitled to the proceeds of a National Service Life

Insurance policy upon the life of her deceased husband, Jerry Shapiro (328-333).*

The policy was issued to the decedent on March 1, 1942, following his induction into the United States Army on February 26, 1941 (55). At that time the decedent was unmarried, and he designated his mother, the petitioner, as his beneficiary. Respondent and the decedent were married October 3, 1942 (54-55). On December 19, 1942, about a week following his commissioning as an officer, the decedent reported to Lieutenant Charles E. Dunn, Adjutant of the Battalion, I. R. T. C., Fort McClellan, Alabama, where he was stationed, stated that he wished to change the beneficiary on his National Service Life Insurance policy from his mother to his wife, and requested the form appropriate to that purpose (132-136). He was given a form entitled "Designation of Beneficiary", which he filled out, signed, and handed to Lieutenant Dunn for his countersignature. This was the only form of which Lieutenant Dunn had any cognizance (140). It contained no specific reference either to insurance or gratuity pay. It was then handed to the sergeant major, who was responsible for its reaching the message center for transmission to its proper destination** (138-140, P'ff's Ex. 2, 244-249). The decedent met his death in a fire in an army camp, on February 22, 1944 (55-56).

On or about May 10, 1944, the respondent, Annette Shapiro, filed her claim with the Veterans Adminis-

* Figures in parentheses refer to folios in the Record.

** The word "designation" appears in the record (140), but this is obviously a typographical error.

tration for the proceeds of her deceased husband's insurance policy (25). Pursuant to this application, the Administration, on June 14, 1944, addressed a request for information to the Adjutant General's Office, War Department. The concluding paragraph of the letter (P'ff's Ex. 4, 257) read as follows:

> "For settlement of this insurance, it will be appreciated if photostatic copies of all beneficiary designations by this officer, including W. D., A. G. O. Form 41, be furnished the Veterans Administration. If this officer signed any papers, such as a confidential information and data sheet, a Questionnaire, a Government Insurance Form or any such paper, please furnish the original or a photostatic copy of such papers."

The reply to this request enclosed a photostatic copy of the "Designation of Beneficiary" W. D., A. G. O., Form 41 (P'ff's Ex. 2, 244-249), the identical form which the decedent had filled out, signed, and caused to be transmitted.

The Veterans Administration had the power to waive any mere formalities. Its request for and acceptance of a photostatic copy of the original "Designation" constituted such a waiver. And even though it was received after the insured's death, it was none the less effective, in so far as the respondent's rights in the policy were thereafter involved.

Thus it appears beyond dispute, that the intention of the insured decedent, Jerry Shapiro, to change the beneficiary upon his insurance policy from his mother to his wife—from the petitioner to the respondent—was unequivocally expressed; and he did everything that could reasonably be demanded to effectuate that intention.

II.

The question presented.

This Court has iterated and reiterated the requirements essential to the granting of a writ of certiorari. We do bear in mind, however, its admonition in *Furness, Withy & Co. Ltd.* v. *Yang-Tsze Insurance Assn. Ltd.* (1917), 242 U. S. 430, that it was "incumbent upon counsel for both sides to see that the petition and reply thereto disclosed the real situation", and its observation, that "The oversight (in that case) has resulted in unfortunate delay and needless consumption of time". We propose, therefore, to examine the theory by which the petitioner seeks to justify her application, and ascertain, *first,* whether it is agreeable with the record, and, *second,* if it is, whether the theory and the arguments in its support can in any manner justify the issuance of a writ consistently with Rule 38 (*Rules of the Supreme Court of the United States*), and this Court's interpretation and application thereof in previous cases. Our first proposition is that

A. Petitioner's Theory Depends for its Authority upon an Actual Denial of the Record.

The petitioner must stand or fall in this proceeding by her ability successfully to defend her submission (Pet., p. 6, VII) that:

> "The *sole question* presented is whether a change of beneficiary of a National Service Life Insurance Policy may be effected by filing with the War Department a *designation of beneficiary of gratuity pay benefits payable in case of death,*

and without execution or filing with the Veterans' Administration of any change of beneficiary of the insurance." (Italics supplied.)

If this is the "sole question", and the petitioner must be deemed to have concluded herself under the Rules, then that part of the statement which we have italicized is a fiction—neither pure nor simple. Its import is that (a) There was no intention on the part of the decedent to change the beneficiary of his insurance, and (b) That, in consequence, there was no such intention concerning which he could take any action to give effect. Furthermore, the assumption is inherent that the insured decedent did a vain and futile thing. There is no evidence in the record which affords even a feeble prop for this hypothesis. The testimony, which we have summarized in our "Summary statement of matter involved" (*supra*), with copious citations to the Record, is its categorical refutation. And so the Courts below have determined. The District Court (Memo. of Dec., 303) observed:

> "In this case we have the two requisites: (1) expressed intention, and (2) an affirmative act having for its purpose the effectuation of this intention." (That is to change the beneficiary upon his life insurance policy from his mother to his wife.)

He says once more (305) that:

> "Since Shapiro was married and his wife living at the time he made out A. G. O. Form No. 41, she automatically was entitled to receive the six-months' gratuity pay benefit upon his death. No form was needed unless it was for his insurance. 10 U. S. C. A. 903."

Judge Augustus N. Hand, writing for the Circuit Court of Appeals (p. 118 of Opinion), remarked:

> "The findings of the trial judge that Shapiro had changed the beneficiary of his insurance policy are indubitably supported. It is most unlikely that when he signed Form No. 41 that he could have intended any other act than to change the beneficiary of his insurance policy. Not only was there compelling oral testimony to support this view, but the form actually signed was adequate in its language (fol. 120) for that purpose. Moreover, it was quite futile to use it to designate the beneficiary of the six months' gratuity because the widow would take in preference to the mother with or without any designation. Therefore, unless Shapiro was familiar with the complexities of the particular uses of the various army forms there was nothing to prevent his using the form given him when he wished to change the beneficiary of his insurance policy. Indeed, Lt. Dunn testified that at the time Form No. 41 was used he did not know it was intended by the War Department only to designate the beneficiary of the six months' gratuity payment and he knew of no other form for use for life insurance. This testimony of a disinterested witness is strengthened by all the probabilities of the situation. The trial judge was clearly justified in his tenth finding:
>
> 'Both the battalion adjutant, Lieutenant Dunn, and Lieutenant Shapiro believed at the time that Lieutenant Shapiro signed the form, and thereafter, that it was intended to, and did, change the beneficiary of Lieutenant

> Shapiro's National Service Life Insurance policy to his wife, the plaintiff herein.' "

Having, as we believe, demonstrated by the Record, and the findings of both the District Court and the Circuit Court of Appeals, the factual ineptitude of petitioner's "sole question", we respectfully submit our second suggestion, that

B. Petitioner Has Offered No Grounds for Her Application Within the Purview of Rule 38.

The "sole question" is not as asserted by the petitioner. For purposes of precision it may be presented in the following terms:

> Did the insured, or did he not, express his intention to change the beneficiary upon his life insurance policy?
>
> Did the insured, or did he not, by appropriate overt act, give effect to his intention?

Both the District Court and the Circuit Court of Appeals have answered these questions emphatically and affirmatively. What the petitioner now seeks is a review by this Court of an evaluation of testimony deemed by both those Courts to be incontrovertible. This Court has made it abundantly clear, and repeatedly, that it will not accept an appeal merely to review the findings of the Courts below upon evidence presented, even where there is material conflict. Here there is none.

We hesitate to elaborate the errors that pervade the petitioner's argument. They refute themselves. We trust our remaining submissions will find their apology in the burden which this Court has laid upon us to

"present with *studied accuracy, brevity and clearness* whatever is essential to ready and accurate understanding of points requiring (the Court's) attention." (Italics in text.) (*Furness* v. *Yang-Tsze &c. Assn., supra.*)

The investment of a particular issue with heterogeneous attributes, and its translation into the field of public importance, are enterprises as painful in their performance as they are unhappy in their results. Petitioner's exertions are no exception. We may be permitted some slight scepticism of her solicitude. It is asserted in substance (Pet., pp. 6-7):

1. That an important question of Federal Law has been incorrectly decided by the Circuit Court of Appeals for the Second Circuit;
2. That its decision is in conflict with that of *Bradley* v. *U. S.,* 143 F. (2nd) 573, and
3. That its decision has so far departed from the accepted rules of law as to call for the exercise of this Court's power of supervision.

It is difficult to relate these claims, even if they had any substance, to the "sole question" to which the petitioner has restricted herself. The first and third of these objections find their value in that they are substantial quotations from Rule 38. Since they have no support in the record their weight in this relation is to be measured by the sole criterion of the petitioner's authority.

The second proposition must be met by emphatic denial. In its support, the petitioner later (Pet'r's. Brief, p. 13) makes the rather reckless assertion that

"In principle, if not entirely on all the facts, the case at bar is indistinguishable from the *Bradley* case." If the parenthetical phrase is intended to suggest the factual identity of the two cases, we are not at all fearful that this Court will be misled. Any inability to distinguish the principles involved in the two cases can be attributed only to an incurable case of intellectual myopia.

The District Court, and the Circuit Court of Appeals, the latter with one dissenting judge, found in the *Bradley* case, that while the evidence disclosed an expressed intention, no overt act had been performed which was calculated to effectuate that intention. The rule, from which there has been no material departure in any case that has been brought to our attention, was applied in the *Bradley* case, as it was in the case at bar:

> In order that a change of beneficiary upon an insurance policy may be effected, there must exist two elements—Expressed intention, and action appropriate to the effectuation of the intention.

Neither of these can operate effectively of itself. The one is as essential as the other, the other as the one.

The petitioner appears in some manner to be dissatisfied with this established rule, and to seek from this Court an infallible guide through intricacies approaching the infinite. This is a counsel of perfection requiring nothing short of omniscience.

III.

The Veterans Administration received all the information necessary to enable it to make an appropriate decision.

The petitioner concludes "The question presented" (Pet., p. 6, VII.) with the assertion that the filing of a designation of pay benefits was "without execution or filing with the Veterans' Administration of any change of beneficiary of the insurance."

We have previously, if inferentially, adverted to this claim (Summary statement of matter involved, *supra*), and recited the facts concerning the source of the Administration's information. We observed that the Administration received from the Adjutant General's Office exactly what it requested—a photostatic copy of the form executed by the insured decedent for the purpose of changing his beneficiary. The information was received subsequent to the officer's death. Neither of these circumstances can defeat the wishes of the deceased officer. There is no claim on the part of the Government that it is in any manner prejudiced by the form of the information, or the delay in its receipt. The only one who has suffered by the delay is the respondent. The petitioner has, in fact, received a substantial sum by reason of the delay, to which she was not entitled.

The following cases are among those relied upon by the petitioner. We are happy to accept them. The insured in the case of *Collins* v. *U. S.* (1947), 161 F. (2d) 64, exhibited the executed change of beneficiary to his wife during his lifetime, leaving it

among his papers, so that it could be transmitted in the event of his death to the appropriate Governmental department. Finding that positive and effective action had been taken to give effect to an expressed intention, the Court (67) says:

> "The very narrow question in this case, then, is whether it was necessary to deliver the executed change of beneficiary to the company (sic) or at least mail it in during the life of the insured in order to constitute a valid change of beneficiary. This question must be answered in the negative. The books are replete with cases holding that a valid change of beneficiary was effected although the application for such change was not received by the company until after the death of the insured."

The Court goes on to discuss the paternalistic interest of the Government in members of the armed services, and proceeds (69):

> "In view of all this, it is unreasonable to conclude that the government intended to encircle the right to change the beneficiary with technicalities and make such a change difficult of accomplishment. It is more reasonable to assume that all the government intended to require was satisfactory evidence of the intent of the insured to change the beneficiary, together with satisfactory evidence showing positive action on his part to effectuate such intent, and that when once this is shown, legal technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent of the insured soldier."

Roberts v. *U. S.* (1946), 157 F. (2d) 906, 909, likewise emphasizes the principle of liberality. The Court says:

> "It will be seen that the judgment below (against the widow-plaintiff) rests upon the absence of the change of beneficiary from the Government's files and upon the testimony of the uncle as to his conversations with the insured. It seems clear to us that these factors are insufficient to outweigh the clear and undisputed written evidence in the insured's admitted handwriting that he had designated his wife as beneficiary of the insurance policy, especially since these writings are supported by the disinterested testimony of the brother officer who assisted the insured to change the beneficiary and saw him execute the document and deliver it to the clerk at the Naval air base."

In both these cases the trial courts had adopted the narrow view urged upon us by the petitioner in this case, and were reversed by the Circuit Court of Appeals. The *Bradley* case was considered and distinguished in both instances.

IV.

A significant discrepancy.

We observe at this point, and respectfully invite the Court's attention to, an italicized passage in the Petition (Pet., p. 4, III. "The evidence."). This purports to summarize the testimony of Lieutenant Dunn on page 48 of the Record (142-144). We regret that we are unable to reconcile this with the

testimony as it appears in the text. It is stated by the petitioner that:

> "*Lieutenant Dunn . . . did not know whether the assured requested a form for designation of beneficiary of six months' gratuity pay from the clerk who gave him the form* (R. 48)."

On his direct examination Lieutenant Dunn stated (135):

> "Lieutenant Shapiro came in and said he was organized and wished to fill out the form changing the beneficiary on his insurance from his mother to his wife."

And in response to an interrogation on cross examination he said (R. 48, fol. 144):

> "I told the clerk to give him the form to change his beneficiary for his National Service Life Insurance."

It may be that there is some explanation for these discrepancies, but it is not our function to suggest it.

V.

The argument.

We have examined every case cited by the petitioner. We have no quarrel with any of them. A number of them have no peculiar application to the issues here presented. As to those which have, we accept for the purposes of this case the rule which they uniformly reiterate—that the effectuation of change of beneficiary upon a National Service Life

Insurance policy is conditioned upon intention expressed by the insured, accompanied by appropriately positive action. The District Court and the Circuit Court of Appeals have unanimously determined that the insured in this case fulfilled both these conditions. There can be no reasonable doubt of the justice of their decision.

Stripped of all that is specious, the petition and supporting argument amount to nothing more than a demand upon this Court that it review the findings of both Courts below upon testimony, all the material elements of which are uncontroverted and incontrovertible. It is, in effect, a plea for a re-evaluation of evidence. This is a burden which this Court has uniformly and consistently declined to accept.

VI.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

All of which is respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 829

CLARA SHAPIRO, PETITIONER

v.

ANNETTE SHAPIRO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case involves a dispute between petitioner, the mother of a deceased veteran, and respondent, his wife, as to the disposition of the proceeds payable by the Government under a $10,000 policy of life insurance issued to the deceased under the National Service Life Insurance Act. Claims with the Veterans Administration had been filed by both the mother and the widow. Since the mother was the last-named beneficiary under the policy and no communication had been received by the Veterans Administration changing the beneficiary, the Vet-

erans Administration held that the mother was the beneficiary and denied the claim of the widow.

Suit for the proceeds of the insurance was brought by the insured's widow against the United States in the United States District Court for the Southern District of New York. The widow based her claim on the contention that the insured had expressed an intention to change the beneficiary originally named in his policy, to make her the beneficiary, and had done affirmative acts to effectuate that intention. The United States admitted its liability for the payment of $10,000 under the insurance contract, but it asserted that the mother had likewise claimed the proceeds of the insurance contract and requested that the mother be interpleaded, that the dispute between the widow and the mother be determined by the court, and that in any event any judgment entered should be subject to a deduction of $1,349.90 theretofore paid by the Veterans Administration to the mother, Clara Shapiro. The mother thereafter answered, asserting her claim to the proceeds of the insurance contract.

The district court held that the widow, the respondent herein, was entitled to the proceeds of the insurance policy, subject to a deduction in the amount of $1,349.90 theretofore paid by the Veterans Administration to the mother. The judgment of the district court was affirmed by the court below. Inasmuch as the determination of the proper beneficiary in this case is essentially a fac-

tual one, and the Government has no interest in the controversy other than to pay the insurance admittedly due to the proper beneficiary, the Government in effect occupies the role of a stakeholder and therefore takes no position as to whether the writ of certiorari should issue.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1948.

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